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SUPREME COURT, U.S.

No. 07-1371

In The
Supreme Court of the United States

CAMBRIDGE LITERARY PROPERTIES, LTD.,
Petitioner,

v.

W. GOEBEL PORZELLANFABRIK G.m.b.H. & CO. KG., and GOEBEL ART G.m.b.H.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S REPLY BRIEF

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June 26, 2008

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REPLY BY PETITIONER CAMBRIDGE LITERARY PROPERTIES, LTD.

I. Respondents' argument that there is no genuine decisional conflict among the circuit courts distorts Petitioner's clear position, and, further, contradicts what Respondents have argued below.

A. Respondents distort Petitioner's legal argument by stating on page 3 that "The case on which Cambridge relies, Goodman v. Lee, 78 F. 3d 1007 (5th Cir. 1996), cert. denied, 519 U.S. 861 (1996), does not support Cambridge's view that a party may avoid application of the Copyright Act by asserting an accounting claim without first establishing ownership." First, Petitioner has never suggested that Goodman stands for that proposition, nor has Petitioner ever advanced such a proposition. Second, Petitioner has consistently stated that, as part of its affirmative case, it must plead (and be prepared to prove) its copyright co-ownership and the basis therefor (as Petitioner did—see Pet. p. 26, 27 & n.7, p. 28). Third, please note Respondents' vague words "application of the Copyright Act"; Cambridge has consistently argued that even if, arguendo, construction of the Act's substantive provisions is required (resulting in Federal subject matter jurisdiction under the second element of the "T.B. Harms test") (please see Pet. pp. 16-17) that does not equate with the action being maintained under the Act's provisions (which would result in the application of the Act's three-year limitations).

B. On the issue of the conflict among the circuits, Respondents radically reverse their position below which was that there is indeed a genuine conflict. In their "REASONS FOR DENYING THE PETITION" (p. 9), Respondents begin their Argument "I" by stating "The Court should deny the petition because there is no genuine conflict among the circuits regarding the applicability of the Copyright Act's three-year statute of limitations in §507(b) to co-ownership and accounting claims." (p. 10). This is in sharp contradiction to what Respondents argued below:

> In *Goodman* the court applied the Act to a claim of copyright ownership but applied a state statute of limitations to the remedy sought--an accounting. *Goodman* is in the minority. As discussed above, the majority position is that if the ownership claim is subject to the Act, any remedies are subject to the Act's three-year statute.[1]

This is an explicit and succinct description of a circuit court decisional conflict. Respondents acknowledged below the existence of a split by arguing that Goodman was against the weight of authority and they now reverse their position when the very existence of a circuit conflict is inimical to their interests.

Moreover, in their argument below, Respondents not only acknowledged the existence of the decisional conflict, but they also referred to its nature and rationale by summarizing the majority position as

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[1] Defendant's Rule 12(B)(6) Motion Reply, docket 73, p.5, n.3.

follows: "Federal jurisdiction carries with it the Act's three year statute of limitations."[2]

Petitioner has pointed out that the crux of the conflict is that the majority flatly holds that if there is federal subject matter jurisdiction then the action is deemed to be "maintained under the provisions" of the Act (by applying §507(b)); Goodman directly contradicts this holding that the mere presence of federal subject matter jurisdiction does not result in the application of §507(b) if the action is not maintained under the Act. (Goodman at 1013).

Respondents continue their avoidance of their previous stance by attempting to deflect attention from the crucial jurisdictional vs. substantive issue. Thus, on p. 12, they state that the Goodman court "did not reach a conclusion regarding whether the three-year statute of limitations in §507(b) may bar a co-ownership claim." Petitioner submits that the Goodman court's discussion (at 1013) clearly shows that it explicitly rejected the Respondents' argument below ("Federal jurisdiction carries with it the Act's three-year limitations.") (id. at n.2). See Goodman, supra, at 1013, holding that even though there was federal subject matter jurisdiction, the action was not "maintained" under the Act (as per §507(b)).

Importantly, and unlike the majority, the Goodman court went further than that and provided a clear rationale for its holding. It delineated how it would circumscribe the applicability of "maintained under

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[2] Id. at p. 2.

the provisions" of the Act. (Goodman, at 1013), namely, only the "civil actions and remedies" "precisely" provided for by the Act. Goodman, supra, at 1013. The Goodman court would only apply the Act's limitations to cases arising under the first category of the T.B. Harms test,[3] namely, "the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record production ... ." (emphasis added). It is clear that the Act does not provide for an adjudication of co-ownership in a non-infringement accounting action by a claimed copyright co-owner.

Accordingly, unless one assumes (as Respondents apparently do) that the Goodman court would have contradicted itself, it seems clear that it would not have applied the Act's limitations to what Respondents term the "co-ownership claim". (Brief, p. 12). Goodman made it clear that federal jurisdiction in that case rested only on the second element of the T.B. Harms test (a claim requiring construction of the Act"), and not the first element. (Goodman, at 1013). Thus, while Respondents argue that Goodman did not reach a "conclusion" whether the Act's limitations "may bar a co-ownership claim" (Brief at 12), the Goodman court's explicit rationale makes it clear that it would not have applied the Act's limitations.

Petitioner submits that it is clear that the nature of the decisional conflict which Respondents correctly

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[3] Judge Friendly's generally accepted formulation in T.B. Harms v. Eliscu, 339 F. 2d 823 (2d Cir. 1964), cert. denied, 381 U.S. 915 (1965); quoted on p. 17 of Petition.

referred to below, is indeed irreconcilable. Nevertheless, in an illogical reach, Respondents attempt to show that the decisional conflict is "not irreconcilable"[4] by stating that the Goodman court "did not reach a conclusion regarding whether the three-year statute of limitations may bar an accounting claim when the underlying ownership claim is time barred." (Brief p. 12).

As we submitted above, the Goodman court would not have applied the Act's limitations to the determination of co-ownership. Accordingly, why would it have applied the Act's limitations to an accounting claim that it held to be governed by state law and state limitations? Indeed, it is clear that no court could rationally hold that if a plaintiff was in fact time barred, under some statute of limitations, from asserting copyright co-ownership, he could nevertheless claim an accounting from an alleged co-owner.

Despite what Respondents say (Brief, p. 3), Petitioner has never advanced such an outlandish proposition (see discussion, supra, at p. 1). What Petitioner argues instead is that its case is not time barred under any statute of limitations, and this case, arguendo, arises under the Act if it requires construction of its provisions, which, under Goodman, does not result in the applicability of the Act's three-year limitations.

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[4] See also Petition, § IV, pp. 25-30, discussing why the First Circuit's attempt to reconcile the decisional dispute (as quoted by Respondents, Brief p. 11) was unsuccessful.

Respondents, in arguing below that §507(b) ("maintained under the provisions") is applicable whenever there is federal subject matter jurisdiction ("arising under") as per any of the three elements of the "T.B. Harms test" (see p. 4 n.3, supra), have in effect highlighted the significance and importance of this decisional conflict delineated in Pet., § IIIA, pp. 19-20. Respondents' argument below also highlights the reversal of the traditional jurisdictional analysis-- if there is federal subject matter jurisdiction, the action is necessarily "maintained under" the Act-- a reversal which distorts the federal/state substantive law dichotomy, as delineated in Section IIIA of the Petition.

In summary, Respondents' arguments below show that there is a genuine decisional conflict among the circuit courts, with explicit, important, and clearly delineated conflicting holdings.

II. Respondents erroneously argue that they would prevail on the authorship issue.

In their Introduction[5] (Brief p. 3), Respondents

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[5] The Introduction also contains a reference to which the undersigned takes exception. Respondents argue that the Court should deny this Petition because of "an indelicate blurring of the role of counsel." (Brief, pp. 3-4) There is nothing improper, unethical or "indelicate" in a lawyer's representing a Subchapter S corporation which he owns. Moreover, even though not required by any court rule, the undersigned made prompt disclosure to the District Court and to the First Circuit. He made the same disclosure in the Rule 29.6 statement in the Petition (p. iii) as well as in the Statement of the Case. (Petition, p. 6) Respondents'

state that "Moreover, the evidence shows that Cambridge has no legitimate ownership rights ... ." Respondents' "evidence" refers to four aspects of copyright law.

First, Respondents denigrate Margarete Seemann's authorship contributions by referring to them as "captions" for the pictures[6] (Brief p. 5). There are no "captions" for the pictures -- each picture on each page is accompanied by a poem authored by Seemann; indeed, respondent W. Goebel has acknowledged her poems, stating that the pictures "blended with poems specifically written by the poetess Margarete Seemann to match the pictures." (emphasis added) (Amended Complaint, §39, App. 118a).

Second, in their "Statement of Facts", they make a conclusory and argumentative statement that "The contract between Fink [the Book publisher] and Margarete Seemann [the poet] made clear that Seemann's contributions to *Das Hummelbuch* were as a work for hire. (Brief p. 5). In fact, that contract contains no evidence of a "work for hire" relationship.[7] It is merely an assignment, for royalties, to the

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gratuitous criticism of opposing counsel is inappropriate in practice before this Court.

[6] Given the Respondents' penchant for deprecating euphemisms, they might well refer to Michelangelo's Sistine Chapel ceiling masterpiece as an "interior space decoration".

[7] For a judicial discussion of the "artist for hire" issue, please see Schmid Brothers, Inc. v. W. Goebel Porzellanfabrik K.G., 589 F. Supp. 497, 502-03 (E.D.N.Y. 1984).

publisher, by Seemann, the person listed as a joint author on the copyright certificate, which is prima facie evidence of its contents (17 U.S.C. §410(c)). A translation of the 1934 Seemann/Fink contract (App. below p. 87) is submitted as Reply App. pp. 1c-3c.

Since there has been considerable discussion about the contents of the Book's copyright certificate (App. below pp. 515-517), Petitioner has included a copy as Reply App. pp. 4c-6c. Please note that at the top the copyright office typed in Seemann's name as the author, in addition to Fink's entry of Seemann's name on line 3. (Reply App. 5c).

Third, Respondents distort the gist of Petitioner's clearly pleaded and argued copyright ownership position by stating that Petitioner's "strategy" is to contend that the Book's 1936 copyright certificate is *prima facie* evidence of Seemann's "ownership interest" (Brief, p. 16) (emphasis added). Respondents continue the distortion by arguing (on p. 16) that the copyright certificate did not identify Seemann as a "copyright owner".

Petitioner has never asserted that Seemann was a copyright owner at the time of the Book's publication, since she had assigned those rights to the publisher. Accordingly, Fink properly applied for registration as the "owner", while also designating Hummel and Seemann as the joint authors. Contrary to what Respondents state, Petitioner asserted that after Seemann's death in 1949, at the time of the copyright renewal in 1962, Seemann's sole heir succeeded, by operation of law, to Seemann's author's rights free and clear of any assignment Seemann made during her

lifetime.[8] See Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373, 375 (1960). Accordingly, Respondents have simply created and then attacked a straw man in arguing that Seemann was not an owner of the Book copyright at the time of publication.

Fourth, as for the Respondents' comment (Brief p. 16) on the 1962 Renewal Certificate, filed by the publisher Fink after Seemann's death, suffice it to point out that a renewal certificate unlike a copyright certificate, has no statutory prima facie validity of its contents, and cannot "trump" the copyright certificate, which has that statutory probative effect (17 U.S.C. §410(c)). It warrants emphasizing that the copyright certificate listed Seemann as a joint author, and an author, by definition, cannot be an artist for hire -- in a case of a "work for hire", it is the employer who by statute, is designated the "author". See §26 of the Copyright Act of 1909: "the word 'author' shall include an employer in the case of works made for hire".

III. Respondents make an unsubstantiated argument that the Petition should be denied because of their prospective affirmative substantive defenses.

Respondents claim (Brief p. 3) that if this case were allowed to go forward, the Petitioner would "have to overcome the defenses of issue preclusion, laches, and judicial estoppel ... ." As for laches, that has not been asserted by them below as an affirmative defense. As

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[8] See Amended Complaint, §31, App. 116a, §34, App. 117a, §§ 45-47, App. 120a.

for judicial estoppel, Respondents omitted that defense after their Rule 12(b)(6) motion was denied without prejudice. (See Respondents' Statement of the Case at Brief, pp. 8-9.

As for Respondents' mention of "issue preclusion", it is noteworthy that, first, the Magistrate Judge rejected that defense (see App. 104a-105a) and the District Judge endorsed that rejection. (App. 54a). Respondents briefed and argued issue preclusion to the appellate court below, with the Petitioner responding that the defense should be "rejected out of hand". The First Circuit did not hear argument on this defense, nor did it deign even to mention it in its opinion.

Respondents have stated (Brief p. 9), in decidedly truncated fashion, why their issue preclusion defense was first rejected below: "unanswered questions" about the undersigned attorney's "financial relationship" with his former client, Schmid, Inc., on whose behalf he signed the consent judgment in question. A brief reading of the Magistrate Judge's Report on that issue shows that Respondents faced (and we submit would face) significant burdens in asserting that defense. The crucial issue, under First Circuit Law is whether the undersigned had in fact exercised "substantial control" over that litigation. The rebuttal evidence that the Magistrate Judge referred to on that issue is that the undersigned had been replaced by another law firm in that litigation and that he had no control over the terms of the final settlement agreement and the consent judgment submitted pursuant thereto. (Pet. App.104-a). Since he was still formally attorney of record, he signed the

document as an accommodation to the client's general counsel. Moreover, Petitioner submitted evidence below that the undersigned had executed the consent judgment in reliance on false representations by the Respondent W. Goebel. (Brief for Plaintiff-Appellant below, pp. 29-31 & n. 14-16). Given the record below, it is surprising that Respondents have burdened these certiorari proceedings with this baseless issue preclusion defense.[9]

IV. Respondents' discussion of the Act's §507(b) legislative history misleadingly conflates two disparate sections of the House Report.

Respondents state (Brief p. 19) that "When Congress enacted the Act of 1976, it expounded on the importance of national uniformity with regard to copyright law". They then quote at length from the House Report.(Brief, pp. 19-20). What Respondents do not state is that the quotation deals only with the 1976 Act's preemption of state common law copyright protection and has nothing to do with the limitations issue being addressed by Respondents. Nevertheless Respondents then immediately segue into the limitations issue, as though the aforementioned quotation pertains to §507(b) -- they state (p. 20) "Consistent with this goal, Congress left the three-year

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[9] We also note, regarding the history of lawsuits between Schmid and the Respondent W. Goebel, that Respondents have painted an incomplete picture (Brief p. 6) suggesting that Goebel was under continued attack by Schmid. The bulk of the undersigned attorney's representation of his client Schmid involved defending against multiple lawsuits by Goebel (three in New York and two in Germany). (App. below p. 342, ¶7).

statute of limitations intact." (emphasis added). But national uniformity is not the reason Congress left the limitations "intact". Respondents omit the next sentence in the House Report on §507(b): "The language of this section (§507(b)), which was adopted by the Act of September 7, 1957 (71 Stat. 633), represents a reconciliation of views,[10] and has therefore been left unaltered." H.R. Rep. No. 94-1476, as reprinted in U.S.C.C.A.N. 5780.

V. Respondents' statement that scholars agree with their argument is not substantiated by their citations.

Respondents (Brief p. 21 state): "Scholars also have concluded that the three-year statute of limitations should apply to ownership claims." However, this purported scholarly consensus is not substantiated by the Respondents' citations which follow that statement.

Thus, their citation to a page in NIMMER ON COPYRIGHT says nothing whatsoever about the issues under discussion here -- that reference deals only with issues of accrual.

Further, Respondents' next citation to an article by Donald E. Biedsman, does not substantiate Respondents' statement. On the pages cited, the

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[10] Two of the disparate views that were evaluated in 1957 were the length of limitations for copyright infringement (see Petition, p. 23) and whether the statute should be procedural or substantive. See 1957 S. Rep. No. 1014 at 1963 (1957).

author only seems to favor shorter rather than longer limitations. Moreover, ironically, the very page cited by Respondents seems to support Petitioner's main argument, in that Biedsman indicates the existence of the decisional conflict by stating (at p. 9), "Although Goodman v. Lee [citation footnote omitted] appears to be a minority view, the possibility exists that longer statute of limitations periods may be applied in late claim situations." (emphasis added).

VI. CONCLUSION.

Respondents' Brief in Opposition contradicts Respondents' argument below, where their legal posture shows that there is indeed a genuine, important, and irreconcilable decisional conflict. Furthermore, Respondents have failed to demonstrate that they would prevail on the merits if this case were allowed to proceed.

Respectfully submitted,

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APPENDIX

APPENDIX A

[Seal]

Contract

The following contract has been concluded between the publishing house Emil Fink, Stuttgart, Heidehofstrasse 15, and the author Mrs. Margarete Seemann from Vienna 17, Hormayrgasse 46:

1) Mrs. Margarete Seemann delivers to Emil Fink-Verlag the 50 poems and the introduction to the „Hummelbuch" for all editions to be printed and published.

2) Mrs. Margarete Seemann receives a royalties of S. 900.- in three monthly payments which will become due on October 15, November 15, and December 15, 1934.

3) Should the poems also be used for pictures and postcards the author will receive an additional fee of S. 200,- , to become due when the pictures or postcards will be published.

4) The publishing house and the author herself can grant the right of translation, however by mutual agreement only, and the author will receive a fee of 4% of the retail price of the book.

5) The reprodction right is given as well by the publishing house as by Mrs. Seemann but only by mutual agreement. The proceeds achieved are halfed between the author and the publishing house.

6) If the poems are broadcasted the author has the right of additional royalties well-ordered by the broadcasting licence.

7) The publishing house Emil Fink will take care on good distribution of the work. The author will extensively support the advertising campaign.

8) As soon as the book is launched the author will receive 30 free hard cover-copies each of the German and foreign language version. If additional books are requested by her there will be an author's discount of 50% on the retail price.

9) Rights and duties of this agreement will be transferred to the legal successors of both parties.

10) The publishing house will deliver incoming press criticism from case to case by copy to the author.

Stuttgart, November 23, 1934

Emil Fink (*Signature*)

3c

Vienna, November 29, 1934

Margarete Seernann (*Signature*)

APPENDIX B

Library of Congress
Copyright Office
of the United States
Washington, D.C.

ADDITIONAL CERTIFICATE OF REGISTRATION
OF A CLAIM TO COPYRIGHT

[Seal of the Library of Congress]

This is to certify that the statements set forth in the attached have been made a part of the records of the copyright office with calim of copyright registered under number Afor. 32509	In testimony whereof, the seal of this office is afixed hereto on August 29, 1995

Marybeth Peters
REGISTER OF COPYRIGHTS
United States of America
REGISTER OF COPYRIGHTS

C-371 October 1982-20,000

Fink (Emil) verlag.

Seemann (Margarete)

Hummel-buch (Das)

A3

JUL 17 1936

1 c. rec'd

Application rec'd JUN-22 1936

©A for. 32509

Fee rec'd $ $2 00 TRUST

IMPORTANT. Applicant must not write in the blank lines above; to do so will cause delay in Copyright Office

GCK

APPLICATION FOR COPYRIGHT

BOOK BY FOREIGN AUTHOR IN FOREIGN LANGUAGE, PUBLISHED ABROAD

REGISTER OF COPYRIGHTS, Washington, D. C. Date 25. April 1936

Of the BOOK named, herein, by a citizen or subject of a foreign state or nation having copyright relation with the United States, ONE complete copy of the best edition, published in a foreign country in a language other than English on the date stated herein, is herewith deposited to secure copyright registration according to the provisions of the Act of March 4, 1909, as amended by the Act of March 28, 1914. $2 (statutory fee for registration and certificate) is also inclosed. The copyright is claimed by

(1) Name of copyright owner Emil Fink - Verlag
(Write full legal name of copyright owner)

(2) Address Heidehofstr. 15. (Street) Stuttgart (City) Germany (Country)

(3) Name of author or translator Hummel, Berta. Seemann Margarete
(Write name in full)

M M-M

[Please turn this over]

5c

(4) Country of which the author is a citizen* 1. Germany 2. Austria
(MUST be stated)

(5) If alien author, state where domiciled in United States

(6) Title of book Das Hummel-Buch Ill.
(Inside title-page)

(7) Published by The Claimant

(8) First published on the 25 day of December, 1934
[State here the day, month, and year when the work was placed on sale, sold or publicly distributed]

(9) Send certificate of registration to

(Street) (City) (Country)

(10) Name and address of person or firm sending the fee American-Austrian Berlin N.W.7

(Street) (City) (Country)

* If the work is a translation, state name and citizenship of the translator, in lieu of the author.

(July, 1931—5,000) U. S. GOVERNMENT PRINTING OFFICE: 1931 [Please turn this over]

6c